(3)

No. 94-1048

FILED
FEB 8 1995
IN THE OFFICE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF

JOHN VANDERSTAR *
SONYA D. WINNER
THOMAS O. BARNETT
ETHAN M. POSNER

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5540
Attorneys for Petitioners

* Counsel of Record

FEBRUARY 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE ANCILLARY RESTRAINTS DOCTRINE	2
A. Least Restrictive v. Less Restrictive	2
B. "No Broader Than Necessary"	4
II. THE SINGLE ENTERPRISE ISSUE	6
III. WAIVER AND ESTOPPEL	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

American Motor Inns, Inc. v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975) 2, 4
Aspen Title & Escrow, Inc. v. *Jeld-Wen, Inc.*, 677 *F. Supp.* 1477 (D. Or. 1987) 6
Brown v. *Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1992), *appeal pending*, Nos. 93-7102, 93-7165 (D.C. Cir.) 7
Calderon v. *Witvoet*, 999 F.2d 1101 (7th Cir. 1993) 9
City of Mount Pleasant v. *Associated Electric Cooperative, Inc.*, 838 F.2d 268 (8th Cir. 1988) 6, 7, 8
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 6, 7, 8
International Travel Arrangers v. *NWA, Inc.*, 991 F.2d 1389 (8th Cir.), *cert. denied*, 114 S. Ct. 345 (1993) 7, 8
Los Angeles Memorial Coliseum Comm'n v. *National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) 7
McNeil v. *National Football League*, 790 F. Supp. 871 (D. Minn. 1992) 7
Mid-South Grizzlies v. *National Football League*, 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) 7
NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 7
North American Soccer League v. *National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) 7, 9
Novatel Communications, Inc. v. *Cellular Telephone Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986) 6
Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 4, 5, 6
SCFC ILC, Inc. v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) 4, 5, 6
Sullivan v. *Tagliabue*, 795 F. Supp. 56 (D. Mass. 1992) 9

TABLE OF AUTHORITIES—Continued

Page

United States v. *Mejia-Alarcon*, 995 F.2d 982 (10th Cir.), *cert. denied*, 114 S. Ct. 334 (1993) .. 9

Volvo North America Corp. v. *Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988) 7

Miscellaneous

VII PHILIP E. AREEDA, ANTITRUST LAW (1986) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1048

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF

Petitioners ask this Court to clear up conflicts in the Circuits and general confusion in the lower courts and to establish clear rules regarding lawful, useful joint ventures for the guidance of entrepreneurs and lower courts.

First, when a lawful joint venture adopts a rule or policy that helps the venture to produce a better product or service, even though the policy may limit "competition" between the joint venturers which would not otherwise have existed, that rule or policy does not violate the antitrust laws merely because the venture participants might have found a less restrictive way to accomplish their purpose.

Second, when a joint venture produces a product that none of its members could produce alone, and the members are economically dependent on their membership in

the joint venture rather than on their individual existence, the joint venture should be treated as a single enterprise and therefore not subject to the "contract, combination or conspiracy" provisions of the antitrust laws.

Respondent has not provided any reason why the Court should not grant the petition and decide these two important issues.[1]

I. THE ANCILLARY RESTRAINTS DOCTRINE

Petitioners showed that the circuits are divided over the proper application of the ancillary restraints doctrine and that the "least restrictive alternative" approach followed by some circuits should be rejected.

A. Least Restrictive v. Less Restrictive

Respondent challenges petitioner's claim that the court below applied a "least" rather than merely a "less" restrictive alternative approach. However, this distinction, even if accurate, misses the point.[2] Regardless of the label applied to the analysis, the approach espoused by respondent, and the court of appeals in this case, reflects an unacceptable intrusion into the reasonable business judgments of joint venture participants. A plaintiff should not be able to defeat summary judgment when challeng-

---

[1] Notably, respondent does not challenge our showing (Pet. at 7 n.5) that intervention by the Court at this stage of the litigation would be appropriate and useful.

We address respondent's waiver and estoppel arguments *infra*, at pp. 8-10.

[2] As explained in the petition, the "less restrictive" alternative approach ultimately devolves into a "least restrictive" analysis. (Pet. at 10 n.8.) The Third Circuit agrees. *See American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (equating the Ninth Circuit's "less restrictive alternative" test with the Fifth Circuit's "least restrictive alternative" test). (Petitioners note that they incorrectly indicated that *certiorari* had been denied in *American Motor Inns*. Pet. at 14 n.12. This was an error.)

ing an ancillary restraint simply by positing a less restrictive alternative that may, in the opinion of some, achieve similar benefits. If he can, joint venture participants are deprived of any means to protect themselves from the burden, risk, and expense of a jury trial under the antitrust laws, except to choose not to form the venture in the first instance.

The decision in this case illustrates the problem with the "least restrictive alternative" approach. The NFL's public ownership policy opposes all public ownership. The reason is, as the court below found, to promote more efficient governance of the NFL and thus a better product. The question was then whether allowing public ownership of non-voting, minority interests—respondent's "less restrictive alternative"—provided the same benefits. Petitioners demonstrated that it did not: The officers and majority shareholders of a corporation owe a fiduciary obligation to all shareholders, regardless of whether the shareholders are entitled to vote or are in the minority.[3] Yet the First Circuit cited this alternative as providing the same benefits as the NFL's policy. Such confusion is inevitable under a test that asks courts and juries to evaluate "less restrictive alternatives" that were never before claimed to provide the same benefits as the restraint being challenged.

Other courts have recognized the need to afford joint venture participants a range of discretion in structuring an enterprise and, accordingly, have upheld as a matter of law restraints that are "reasonably related" to lawful

---

[3] Sullivan himself testified to facing the same "detrimental conflict" cited by the First Circuit when the Patriots elected to buy out their previous publicly held shares—which were non-voting and a minority—in the mid-1970s. Sullivan testified that "what was in the best interests of the league was a more important factor than what was in the best interests of the stockholders, and that had put me in a constant conflict in my own mind." (Ex. 1253 at 5-128).

joint ventures.[4] Indeed, the choice between the NFL's policy and the alternative proffered by respondent is precisely the kind of "calibration" that Judge Bork denounced in *Rothery* and the Eighth Circuit refused to allow in *SCFC*. Similarly, the Third Circuit in *American Motor Inns*, 521 F.2d at 1248-49,—a case respondent fails to address—took pains to distinguish its more deferential approach from the "least restrictive" alternative available approach taken by other circuits. Professor Areeda also rejects such efforts:

> [R]efined comparisons among alternatives are usually impossible. We must be content to compare crudely the actual restraint with other possibilities. Some courts wisely ask only that the challenged restraint be "reasonably necessary" to achieve a legitimate objective. It would not be if equal benefits could be obtained through *substantially* less restrictive routes. Yet, a restraint can be "reasonably necessary" even though some less restrictive alternative exists.

VII PHILIP E. AREEDA, ANTITRUST LAW ¶ 1505b at 388 (1986) (emphasis added) (cited by respondent at page 15).

B. "No Broader Than Necessary"

Respondent asserts that *some* of the authorities that petitioners cite as rejecting the "least restrictive alternative" analysis in fact follow this approach but characterize it as a "no broader than necessary" test. (Opp. at 13-14.) However, this language refers to the *scope* of the restriction as opposed to the *degree*. In *Rothery*, Judge Bork explained that a restraint is broader than necessary if "part of the restraint suppresses competition without

---

[4] *See, e.g., SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3rd Cir. 1975).

creating efficiency." 792 F.2d at 224. Judge Bork made clear, however, that as long as the entire restraint provides a benefit to the venture, juries should not be asked to "calibrate degrees of reasonable necessity" or to make "judgments of degrees of efficiency." 792 F.2d at 227. Likewise, in *SCFC*, the Tenth Circuit properly required that the challenged restraint not extend beyond the scope of its proffered justification, but it expressly eschewed any evaluation of the proper degree of any restraint that was reasonably related to that purpose. 36 F.3d at 972.

To illustrate the point, two companies that compete in the manufacture and sale of Product A could form a joint venture to produce an entirely different product, Product B. A provision that restricted the ability of the two companies to compete in the sale of Product A would almost certainly be "broader than necessary" to achieve the legitimate goals of producing Product B. Similarly, in *Rothery*, a decision by Atlas to prohibit *intra*-state competition among its *inter*-state carrier agents might well have been broader than necessary to address Atlas' free-rider concerns in the context of the *inter*-state service at issue in that case.

In this case, the public ownership prohibition is not *broader* than necessary in that, as the First Circuit acknowledged, it is reasonably related to the legitimate goal of creating more efficient league governance.[5] Respondent's use of language in *Rothery* and *SCFC* illustrates the actual and potential confusion in this area and under-

---

[5] It is irrelevant whether the appeals court found this connection as a matter of undisputed fact or assumed the connection *arguendo*, as respondent argues (Opp. at 6 n.2). In either event, the appellate court decision rests upon this connection and must be judged on that basis. Furthermore, respondent effectively conceded this point when he decided to argue for an alternative that would include some restrictions on public ownership. (Opp. at 12.) If there were no such benefits, then there would be no justification for *any* constraint whatsoever on public ownership.

scores the need for guidance from the Court. The Court should clearly establish that ancillary restraints that are reasonably related to the lawful purposes of a joint venture enhance consumer welfare by creating efficiency and thus do not violate Section 1 of the Sherman Act.

II. THE SINGLE ENTERPRISE ISSUE

Respondent argues that no precedent compels the single-enterprise ruling sought by petitioners because the Court in *Copperweld* noted the "complete unity of interest" between a corporation and its wholly-owned subsidiary. (Opp. at 21) (*quoting Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984)). While the Court in *Copperweld* necessarily addressed the specific facts of the case then before it, respondent misses our point. The issue is whether petitioners are correct that the *principles* behind the Court's decision in *Copperweld*, as applied in such cases as *City of Mount Pleasant* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988), should lead the Court to find a single enterprise, even where there is not a complete unity of interests, when the members of the joint venture are economically dependent on the venture rather than themselves separately.[6] Petitioner respectfully submits that the Court should extend *Copperweld* to this case.

The cases cited by respondent do not compel a contrary result. Most of these cases were decided prior to the Court's 1984 *Copperweld* decision and are therefore

---

[6] This issue has arisen in contexts outside of sports leagues. Thus, for example, some courts have held that a corporation and its majority-owned subsidiary cannot conspire within the meaning of Section 1, while other courts have refused to reach the same result. *Compare Novatel Communications, Inc.* v. *Cellular Telephone Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412 at 62,172-73 (N.D. Ga. 1986) (parent cannot conspire with 51-percent-owned subsidiary) *with Aspen Title & Escrow, Inc.* v. *Jeld-Wen, Inc.*, 677 F. Supp. 1477 (D. Or. 1987) (parent can conspire with subsidiaries in which it owns 60 percent or 75 percent of stock).

immaterial to the analysis.[7] Some cases address different factual circumstances.[8] Other cases did not address the single enterprise issue.[9]

But the most serious failing in the opposition brief is respondent's attempt to explain the decision in *City of Mount Pleasant*. The petition established that this important decision is (a) a logical application of the principles in *Copperweld* and (b) inconsistent with the decision of the First Circuit in the present case. Respondent never addresses this argument. Instead, he rests on a citation of *McNeil* v. *National Football League*, 790 F. Supp. 871 (D. Minn. 1992), a subsequent *district court* decision in the same circuit which does not even cite *City of Mount Pleasant*. Because *McNeil* was settled, the Eighth Circuit never addressed this district court opinion. In any event, the law of the Eighth Circuit remains unchanged by the *McNeil* decision, as shown by *International Travel Ar-*

---

[7] *See, e.g., Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); *North American Soccer League* v. *National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *Mid-South Grizzlies* v. *National Football League*, 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

[8] *See, e.g., NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *Volvo North America Corp.* v. *Men's Int'l Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988). *NCAA* involved an association that consists of numerous individual colleges and leagues that are far less integrated than the NFL and that were not acting as a single entity with respect to the challenged television limitations. 468 U.S. at 113-14. Similarly, the *Volvo* case involved individual tennis players and independent, competing tennis tournament owners and directors who made arrangements to produce separate tennis events that were not part of a league. *See* 857 F.2d at 58-59.

[9] *Brown* v. *Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1992), *appeal pending*, Nos. 93-7102, 93-7165 (D.C. Cir.).

rangers v. *NWA, Inc.*, 991 F.2d 1389, 1398 (8th Cir.), *cert. denied*, 114 S. Ct. 345 (1993).

In this case, respondent ignores the economic reality that the NFL consists of interdependent teams that must act in a collective manner to provide the league's entertainment product to the public. As Chief Judge Arnold explained in *City of Mount Pleasant*, economic reality within a cooperative venture "will always" include "varying interests" and coalitions that "come and go according to changing conditions and the interests of the various factions." 838 F.2d at 277. However, this fact is immaterial if the economic success of the venture's members "depends, and has always depended, on the cooperation among themselves." *Id.* The members of the NFL do not compete with the NFL itself, and they do not compete with one another *except* as they have chosen to do so within the NFL structure. That is the dispositive point.

The Court should grant the petition to hold that, under the principles set forth in *Copperweld* and *City of Mount Pleasant*, where a joint venture such as the NFL produces a product that none of the venture participants could produce on its own, and where the participants are economically dependent, not on their individual efforts alone but on the success of the joint venture as a whole, the venture is a single enterprise under Section 1 of the Sherman Act.

III. WAIVER AND ESTOPPEL

Although respondent spends a substantial portion of his opposition brief arguing that the issues presented in the petition were not raised below and/or that petitioners should be estopped from appealing them, the Court can quickly dismiss these assertions. These same arguments were presented to and rejected by the court of appeals. Put simply, both the ancillary restraints doctrine and the

single enterprise argument were raised and decided in both the district court [10] and the court of appeals.[11]

Contrary to the implication in the opposition brief, the petition does not take issue with the jury instructions at trial. Rather, petitioner contends that the district court erred in denying the NFL's motions to dismiss and for summary judgment. Thus, respondent's allegations that petitioners did not raise issues *at trial* are beside the point; our point here is that no trial should have been held.[12]

Likewise, respondent's argument that the NFL should be estopped from raising the single enterprise argument is misplaced. (Opp. at 16-17.) Once the district court had dispositively ruled prior to trial in favor of respondent on this issue, the NFL was under no obligation to raise the issue again at trial. Indeed, the NFL's counsel specifically cited the district court's "ruling as a matter of law" on the

---

[10] The ancillary restraints argument was raised by the NFL both in its motion to dismiss and in a proposed jury instruction at trial. With respect to the single enterprise argument, in denying the NFL's motion to dismiss, the district held that, because *NASL* and *Raiders* "establish that agreements entered into between professional football owners" are "justiciable under [Section 1]," Sullivan had shown "an agreement among two or more persons or distinct business entities." *Sullivan* v. *Tagliabue*, 795 F. Supp. 56, 57 (D. Mass. 1992).

[11] The NFL raised both points in its opening appellate brief (*see* Brief of Defendants-Appellants at 28-40), and the First Circuit addresed both issues in its decision (*see* 34 F.3d at 1099, 1102-03; Pet. App. 10a-12a, 17a-19a).

[12] In any event, the NFL was not required to continue to object after the district court had ruled for respondent on an issue. *See United States* v. *Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir.) ("[r]equiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial [is] unnecessary"), *cert. denied*, 114 S. Ct. 334 (1993); *Calderon* v. *Witvoet*, 999 F.2d 1101, 1108 (7th Cir. 1993) (defendant is not required to raise issue after it is decided in court's summary judgment opinion).

single enterprise issue as the reason for not pressing the argument at that stage of the proceedings. (J.A. 1512.)

Finally, the court of appeals reached and decided both of the issues presented in the petition, and the Court is free to reach any issue decided by the appellate court below.

CONCLUSION

For the reasons stated in the petition and above, the Court should grant the petition for a writ of certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

JOHN VANDERSTAR *
SONYA D. WINNER
THOMAS O. BARNETT
ETHAN M. POSNER

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5540
Attorneys for Petitioners

* Counsel of Record

FEBRUARY 1995